Introductory Statement of Richard F. Scruggs
before the
Senate Commerce Committee
February 26, 1998

Introduction

Good morning Mr. Chairman and Distinguished Members of the Committee. I am Richard Scruggs, the Senior Partner in the law firm Scruggs, Millette, Lawson, Bozeman & Dent, P.A., located in Pascagoula, Mississippi. As you may know, I represent the State of Mississippi and numerous other States in litigation against the tobacco industry. I also was privileged to have participated in the months-long negotiations between the tobacco industry and the Attorneys General of the states involved in litigation against the industry. I also testified before the Senate Judiciary Committee with respect to the June 20th Agreement last July. I am most pleased and honored to now appear before this Committee as it continues its consideration of the many issues surrounding how tobacco products are manufactured, marketed and distributed in the United States, and in formulating solutions to the complex questions surrounding the tobacco industry's accountability for the harm that it has done to the nation, both in human and economic terms.

I want to say at the outset, that I am a trial lawyer by profession, and that I have devoted most of my professional life to representing thousands of injured individuals in the "mass tort" context. My views on the civil liability provisions of the June 20th Agreement are thus principally colored by the palette of my personal experience, and were not developed in a purely academic setting. I truly appreciate the opportunity to address the Committee as a practitioner, and not a theorist.

Summary

The thrust of my testimony is to give the rationale and motive of the negotiators of the June 20th Agreement for the limitation on class action lawsuits. This limitation has been mischaracterized as "immunity" by some who oppose comprehensive legislation. In reality, the

restrictions on class actions are “immunity” only from collusive or friendly class action settlements that have characterized much of the recent history of class action litigation.

Having been a leading practioner of mass tort litigation for the past 15 years, I can testify that class actions are not, in practice, the victim-friendly legal device that some in the tobacco control movement mistakenly believe they are. Instead of presenting a serious threat to the tobacco industry from mass litigation, class actions present the industry with an enormous opportunity to settle cheaply with a few class representatives and thereby impair the claims of the entire class. It is important to understand that in a class action, only a few lawyers representing a handful of plaintiffs undertake the representation of perhaps millions of victims. If they are incompetent, or, worse, if they cut a collusive deal with the defendants, the rights of the entire class will be impaired or lost. Class members, many of whom have meritorious claims, are generally unaware of, and have little or no voice in the management of their cases.

While there are many ethical and competent members of the class action bar, like those who led the Castano tobacco class action, there are few reliable safeguards under present law to prevent ill advised or “friendly” settlements. The Broin flight attendant class action settlement, wherein the class members received no monetary compensation but lost their claims for punitive damages exemplifies the mischief that class actions enable. And there are many examples of “ coupon” class action settlements that “immunized” the manufacturer of defective products for little more than a token benefit to the class members.

On the other side of the coin, the legal hurdles facing even the most competent class counsel in successfully certifying an involuntary mass tort class action are almost insurmountable as a result of the Supreme Court’s recent decision in Amchem Products, Inc. v. Windsor, and the Fifth Circuit Court of Appeals decision in the Castano class action. I know of no involuntary class action verdict in mass tort that has survived appeal.

Thus, restricting class actions against the tobacco industry is really no concession at all, and the restriction prevents the industry from cheaply evading liability to the individual victims. The potential under present law for a collusive settlement of an entire classes’ claims far exceeds

the illusory benefits of class actions as a public health weapon against big tobacco.

Background Facts

As I indicated in my testimony before the Senate Judiciary Committee last July, the issues currently before the Committee are weighty indeed. Certain of the now well-known facts surrounding cigarette consumption in this country clearly demonstrate the breadth and serious nature of the issues now before the Committee:

- Approximately 50 million Americans currently smoke cigarettes;
- Approximately 6 million Americans currently use smokeless tobacco products;
- These products kill more than 400,000 Americans each year due to cancer, respiratory illnesses, heart disease, and other health problems;
- Cigarettes kill more Americans each year than AIDS, alcohol, car accidents, murders, suicides, illegal drugs, and fires **combined**;
- 3,000 children start to smoke every day in this country and 1,000 of those will die prematurely of a smoking-related disease; and
- Cigarette smoking continues to rise among American secondary school students.

All of these facts were essentially well-known by the spring of 1994, but at that time, despite numerous attempts by private litigants during the previous four decades, the tobacco industry had never paid even a penny to anyone seeking compensation for injuries allegedly caused by consumption of tobacco products.

Against this factual backdrop, Attorney General Mike Moore of Mississippi filed the first lawsuit by a State government against the major cigarette manufacturers in the United States on May 23, 1994. In that action, General Moore sought injunctive relief to protect Mississippi's children from the marketing practices of the tobacco industry, and sought restitution for hundreds of millions of dollars spent by Mississippi taxpayers occasioned by the provision of health care to Mississippi's indigent citizens and to those other citizens who qualified for medical assistance under Medicaid and various other State-sponsored programs, such as charity hospitals and

State-funded health insurance programs. Ultimately, 39 other States, certain cities and counties, and the Commonwealth of Puerto Rico brought similar civil actions against the tobacco industry. Additionally, various private putative class action lawsuits and a host of individual suits have been brought against the tobacco industry and various of their agents and consultants during recent years.

All of these civil actions proved to be complex, expensive, cumbersome and hard-fought. While I can report to the Committee that the Mississippi, Florida and Texas lawsuits now have settled, each and every one of the other State lawsuits remains hotly contested and is being hard-fought in courtrooms around the country. In fact, as I am sure the Committee knows, Attorney General Humphrey and his able Minnesota legal team are in quite a contentious trial against the tobacco industry as we sit here today.

It was the pressure of such hotly contested lawsuits that brought the Attorneys General, certain of the private litigants and the tobacco industry together for historic and unprecedented settlement talks in April of 1997. As the Committee knows, those talks gave rise to the Proposed Resolution which was announced on June 20, 1997. It remains my view that the only prospect that the remaining litigants have for swift, fair, inexpensive and consistent resolution of their respective positions is through national legislation which is based upon and builds upon that proposed resolution, coupled with certain critical advertising and marketing obligations being placed upon the tobacco companies through a binding, enforceable protocol and through enforceable consent decrees entered in the various State lawsuits.

As the Committee continues to consider the details of the Proposed Resolution, and the comments of its proponents and its critics, it must be remembered that the Proposed Resolution was concluded in settlement negotiations while the parties were engaged in the heat of battle in courtrooms all over the country, and that, despite the agreements contained in the Proposed Resolution, those lawsuits continue unabated. Regrettably, the devastating effects of tobacco consumption by Americans also continue unabated. When I first appeared before the Senate Judiciary Committee on July 16, 1997, I observed that since the litigants concluded the Proposed

Resolution, approximately 78,000 of our children had started smoking, and that nearly 26,000 of them would die prematurely from smoking-related illnesses. **As of today, our experts tell us that approximately 753,000 of our children have started smoking since the Proposed Resolution was concluded, and approximately 251,000 of them will die prematurely from smoking-related illnesses.** Clearly, it is time for a comprehensive national legislative solution to this most serious threat to the public health.

Nature of the Legal Claims Against the Industry and Relief Sought

In their respective lawsuits against the tobacco industry, the various Attorneys General around the country brought a wide variety of equitable and legal claims , including: Restitution/Quasi-Contract -- Unjust Enrichment, Indemnity, Negligence, Strict Liability for Defective and Unreasonably Dangerous Products, Breach of Express and/or Implied Warranties, Negligent Performance of Voluntary Undertakings, Fraud/Intentional Misrepresentation, Conspiracy and Concert of Action, Liability for Aiding and Abetting Others, Injunctive Relief, Common Law Public Nuisance, Violations of Consumer Protection/Deceptive Trade Practices Acts, Consumer Fraud, Violations of State Antitrust Acts, Violations of Federal and State Racketeer Influenced and Corrupt Organization Acts, False Advertising, and Wrongful Interference with Legal Obligations.

While the particular relief sought in these actions varied depending upon the specific law of the jurisdiction involved, the claims included, among others, requests for injunctions, claims for payment of money damages, payment of restitutionary damages, disgorgement of profits, claims for treble damages, pre-judgment interest, costs, attorneys' fees, declaratory relief, disclosure of previously withheld research documents, demands for funding of corrective public education campaigns, demands for funding of smoking cessation programs, and demands for the disbanding of trade organizations.

Comprehensive Nature of the Proposed Resolution

The wide array of claims brought against the tobacco industry and the attendant complex

legal issues thus presented, coupled with the clear and present damage being visited upon the public health by the consumption of tobacco products, all greatly complicated the negotiating process, but made it crystal clear to the negotiating team that a comprehensive resolution would be required. It became clear that the terms of any resolution would have to be integrated and complementary if the litigation goals of the Attorneys General and the private litigants were to be realized. Thus, while individual provisions of the Proposed Resolution rightly have come under particular scrutiny, the Proposed Resolution must be viewed as a *systemic and inter-related* resolution to a complex array of social, public health, legal and economic issues.

The Proposed Resolution will provide state and federal governments with the mechanisms they need to address the complex problems presented by the use of tobacco products in America -- including issues related to FDA regulation of tobacco products, marketing, advertising, and like issues related to underage usage of tobacco products, significant and verifiable changes in the corporate culture of the tobacco industry, licensing of cigarette vendors and enforcement of laws pertaining to underage sales, public education, medical and scientific research into less hazardous products, counter-marketing to reduce the allure of smoking to young people and to encourage current smokers to quit, the funding of smoking cessation programs, requiring the disclosure of the tobacco industry's non-public past and future internal laboratory research, the provision of industry-funded health care, and individual access to the courts, to civil trial by jury and to full compensation to those harmed by the tobacco industry. Importantly, the Proposed Resolution recognizes that no truly comprehensive solution to the issues presented can be accomplished in the near future without the cooperation of the Tobacco Industry.

<u>Issues Related to Punitive Damages</u>

As the Committee doubtless knows, punitive damages have been a part of the tort system in this country throughout its history, although not all states permit punitive damages. Even where punitive damages are allowed, some states provide caps on the maximum amount which may be awarded and at least one jurisdiction provides that a portion of any punitive damages awarded in an individual case be remitted directly to the state. Punitive damages in civil actions

are not generally regarded as compensatory in character, rather they are awarded to punish particularly egregious misconduct and to deter others from engaging in such wrongful conduct in the future.

I am sure the Committee realizes that the Attorneys General, their counsel and counsel for the private litigants were of one voice during the negotiations that it was essential for the tobacco industry to be subject to punitive damages for their prior misconduct. The tobacco industry was equally adamant that they be protected from such awards in individual cases, arguing that such awards are inherently unpredictable. In return for significant punitive concessions, both monetary and regulatory, the Proposed Resolution would resolve on a societal and uniform basis all punitive damages claims **for past misconduct only** as part of the overall settlement package. A close examination of the Proposed Resolution will demonstrate that an incredibly high monetary price was exacted from the tobacco industry in settlement of the claims, including the punitive damages claims, of the State and private litigants: the tobacco industry will be required to pay $10 billion on the day legislation substantially similar to the Proposed Resolution is signed; will pay $25 billion into a Public Health Trust during the first 8 years under the legislation; will pay $335.5 billion during the first 25 years of the legislation, with $15 billion to be paid annually in perpetuity, subject to certain reductions if the volume of sales of tobacco products to adults falls; and will become one of the most heavily regulated industries in America.

There certainly are those who criticize the Proposed Resolution for "giving up individual rights to punitive damages,"but it must be remembered that punitive damages are designed to punish and deter culpable defendants, not to compensate injured claimants. Additionally, no litigant has ever obtained a punitive damages **verdict** against any member of the tobacco industry. That fact illustrates yet again the truly historic nature of the Proposed Resolution negotiated by the Attorneys General, since they were able to extract huge monetary concessions from the tobacco industry specifically as punitive damages, while at the same time preserving punitive damages availability for any future misconduct of the industry.

Also, it must be remembered that, in actual practice, punitive damage awards are

infrequent and usually moderate in size. In June of 1996, The Wall Street Journal reported the findings of an in-depth study on punitive damages co-authored by Professor Theodore Eisenberg of Cornell Law School. (Edward Felsenthal, *Punitive-Damage Awards Found To Be Mostly Modest and Rare*, Wall St. J., Interactive Edition, June 16, 1996). That study found that juries seldom awarded punitive damages in product liability or medical-malpractice cases, and that it was more likely that such damages would be awarded in cases such as assault or slander where specific intentional misconduct was involved. Additionally, a recent article in the ABA Journal (Mark Thompson, *Applying the Brakes to Punitives -- But is There Anything to Slow Down*, ABA J., September 1997, p. 68.) noted that the United States Supreme Court took a dim view of " grossly excessive" punitive damage awards and its decision in *Gore v. BMW of America Inc.*, 116 S.Ct. 1589 (1996) had been used at least 20 times to reduce multimillion-dollar punitive awards. That article also cited Professor Eisenberg's in-depth study and noted that juries awarded punitive damages just 6 percent of the time and that the statistical average punitive damages award was just 38 percent higher than the average compensatory damage award.

I realize that the punitive damages debate generally between plaintiffs' attorneys and defense attorneys will continue. But I also believe that the specific issue of punitive damages availability to individual claimants for past tobacco industry misconduct is, in practice, a non-issue, given the realities of trial practice, and given the punitive aspects of the Proposed Resolution already extracted from the Tobacco Industry. **Also, it bears emphasis that the proposed resolution does not impact at all any prospective litigant's entitlement, if any, to punitive damages for future misconduct by the tobacco industry that causes harm to such prospective litigant.**

Issues Related to Class Actions

Critics have made much of the fact that the Proposed Resolution would provide for individual trials only and would not permit class actions to be brought against the industry in the future, without the tobacco industry's consent. Many also believe it is safe to presume that the industry would not consent to such class actions. But recent decisions in several tobacco-related

class actions and in the United States Supreme Court with respect to "settlement class actions" make it impossible to predict with certainty that the industry would withhold such consent. In any event, I do not believe that class actions are the economical and consumer-friendly devices that many believe them to be. To the contrary, I firmly believe that the class action vehicle is not particularly suited to compensate the millions of victims of smoking-related diseases. I am convinced that the Proposed Resolution's elimination of class actions in favor of individual suits was an incredibly good bargain, that gave up very little in return for a comprehensive, complex and integrated solution to a very serious public health problem.

Last summer, the United States Supreme Court rendered its decision in *Amchem Products, Inc. v. Windsor*, 117 S.Ct.2231 (1997) affirming the Third Circuit's decertification order of a class-action certified to achieve a global settlement of potentially hundreds of thousands, or even millions, of present and future asbestos personal injury claims. Quoting from the Third Circuit's opinion, the Supreme Court noted at page 2250 of its opinion one of the defects in the class certification:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . **Each has a different history of cigarette smoking, a factor that complicates the causation inquiry**. (emphasis added)

While a detailed analysis of *Amchem* is beyond the scope of my testimony, the decision surely teaches that maintaining class actions on behalf of injured smokers will be singularly more difficult, since each and every smoker has a different and unique smoking history, facts which the tobacco industry will seek to exploit in any class action certification attempt.

The Committee is undoubtedly aware of the contentious nature of class action litigation in general, with critics railing against the "sell-out" class actions that provide for millions of dollars in attorneys' fees for class counsel, but that result in near-worthless "coupons" or other insignificant compensation to class members. Tobacco-related class action litigation is particularly unwieldy,

given the tobacco industry's claims that each individual's smoking patterns and history are different, as are the specific health affects of smoking upon each particular individual. I believe such class actions are ill-conceived as vehicles to protect the interests of millions of injured smokers because in such cases, class action attorneys can position themselves to "protect" (or " tamper with") the rights of millions of people that the lawyers will never meet. Put another way, millions of injured individuals would have their cases controlled and their rights affected by lawyers that they do not know and by lawyers that they did not hire. It is precisely this feature of mass-injury class actions that the Association of Trial Lawyers of America views with a critical eye and that it addressed in a resolution by its Board of Governors on October 15, 1996 (Kristin McGovern & Jeffrey White, *The Amchem Decision: Implications for Future Mass Tort Litigation*, ATLA Exchange Quarterly, December 1997, p. 2.):

> Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury . . . .
>
> Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

Similarly, Public Citizen and Trial Lawyers for Public Justice are two organizations that routinely object to class action settlements that recover little or nothing for class members, that give up the right of class members to a jury trial and that result in huge fees to class counsel. In fact, a Public Citizen co-founder opposed the recent settlement of the Broin class action brought by airline flight attendants in Miami state court. And while hailed as a "stunning victory" by some academics who oppose the Proposed Resolution, the Broin case illustrates vividly the weaknesses inherent in the class action vehicle. Prior to the settlement in Broin, the Court's rulings indicated that despite the class action status of the litigation, the trial of individual damages issues might be required. The settlement removed any doubt on that score. Here, for the most part, is what the

Broin settlement accomplished for the class members -- the individual flight attendants currently suffering from a tobacco-related illness:

> **Zero** compensation or money damages to any of the class members, but $300 million to establish a non-profit research foundation, and $49 million to the class lawyers for fees and costs;
>
> the right to bring **individual** lawsuits against the tobacco industry, but without any right to seek punitive damages or any other type of non-compensatory damages;
>
> no class member can seek any recovery for any alleged fraud, misrepresentation, RICO violation, suppression or concealment theory, or any other theory based on the defendants' willful or intentional conduct;
>
> no class member is permitted to seek to join together with any other plaintiff in a suit against the industry;
>
> while class members will be able to use the evidence submitted at the initial trial, the defendants reserved the right to raise all appropriate objections;
>
> the class members can sue in Dade County, Florida, or anywhere else that venue is proper;
>
> the defendants will have the burden of proof of "general causation," i.e., that environmental tobacco smoke causes certain tobacco-related illnesses mentioned in the complaint, but the individual class member still has the burden of proof on all other issues, including that tobacco smoke caused that individual's particular disease;
>
> the defendants agreed to support the enactment of federal legislation that would prohibit smoking on segments of regularly scheduled international flights that originated or terminated in the United States.

Several "dissident" class members and their counsel objected that "Everybody whose rights were given up got less than nothing." Another attorney for objecting class members from Public Citizen complained to the Court that class counsel had "[given up the guts of his case. No more fraudulent claims. No more RICO claims. No punitive claims." (Michael Connor, *Dissidents Say Florida Secondhand Smoke Deal a Stinker*, Reuters, Miami, Jan. 26, 1998.) Despite the objections, the Court recently approved the settlement agreement, and not surprisingly, attorneys for objecting flight attendants vowed that they would appeal. (Patricia Zengerle, *Flight*

Attendants Tobacco Deal to Stand in Florida, Reuters, Miami, Feb. 6, 1998.) In approving the settlement agreement, the trial judge noted that he had doubts about the flight attendants' chances of winning the trial. "Taken as a whole, the outcome of this case in this court's opinion was far less than 50-50." (Catherine Wilson, *$349M Smoke Settlement Approved*, The Associated Press, Miami, Florida, Feb. 7, 1998.)

The Castano class action filed in the United States District Court in New Orleans was decertified by the Fifth Circuit Court of Appeals in May of 1996, and a similar class action in Pennsylvania was dismissed by the trial court several months ago. And while several class actions have been filed in various parts of the country, I believe the Amchem decision will favor the tobacco industry's efforts to fight certification of those class actions due to the individual and unique smoking history that each class member brings to the litigation.

When viewed in the context of the entirety of the Proposed Resolution and the current state of the law, I believe the Proposed Resolution protects the interests of the individual litigant seeking compensation from the tobacco industry, while achieving historic financial and regulatory concessions from the tobacco industry. This is especially true given the requirements for the industry to disclose its past and future internal research documents and the creation of an industry-funded national document depository. Documents produced into the depository are to be deemed produced for any litigation in the United States and will greatly reduce the costs normally associated with document discovery in civil actions against the tobacco industry. Thus, every citizen who alleges that he or she has been harmed by the tobacco industry will be guaranteed access to the courts in order to seek compensation for his or her injuries, and to the trial by jury which is guaranteed by the Seventh Amendment.

Such litigation will become significantly less expensive for individual litigants once the mechanism for disclosure of industry documents becomes operative. In fact, the disclosure of large numbers of documents has already begun to occur, and the industry recently indicated that it intended to post thousands of documents on the Internet. It is precisely this mechanism providing for the open, speedy and inexpensive access to discovery that minimizes the impact of the

Proposed Resolution's ban on case consolidation and aggregation absent Tobacco Industry consent. Again, the individual injured citizen gives up little and gains much in this bargain.

Conclusion

The Proposed Resolution provides an historic opportunity to resolve the most pressing public health problem in American history. It is an opportunity that was fought for and won at great expense and against a formidable foe. The Proposed Resolution, while not perfect, provides an acceptable and efficient mechanism for the vindication of each injured individual's rights under the civil justice system. We are poised now to achieve the total reformation and restructuring of the tobacco industry in the United States, and most importantly, we are on the verge of achieving the means to protect a generation of America's children from the ravages of early tobacco-related death. I remain confident that with your leadership, we will achieve these most important goals. Thank you, again, for the opportunity to participate in the proceedings before the Committee.